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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONDRE NESBY,

Defendant and Appellant.

B286403

(Los Angeles County  
Super. Ct. No. NA099314)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura Laesecke, Judge. Affirmed; remanded for resentencing.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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Leondre Nesby appeals from a judgment of conviction of six counts of second degree robbery and other offenses in connection with the May 2015 robberies of two medical marijuana dispensaries. The jury also found true multiple firearm-use allegations. Nesby's only contention on appeal is that we should remand to allow the trial court to exercise its discretion to strike the firearm-use enhancements under Penal Code sections 12022.5, subdivision (c), and 12022.53, subdivision (h).<sup>1</sup> The People concede, and we agree. We affirm the judgment of conviction, but remand for resentencing for the trial court to decide whether to strike the firearm-use enhancements.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. The Jury Verdict and Sentencing<sup>2</sup>*

Following a jury trial, Nesby was convicted of six counts of second degree robbery (§ 211; counts 1, 2, 3, 4, 6 & 10),<sup>3</sup> one count of false imprisonment (§ 236; count 7); one count of second degree commercial burglary (§ 459; count 8); and one count of assault with a firearm (§ 245, subd. (a)(2); count 9). The jury found true the allegations Nesby personally used a firearm in the commission of the offenses charged in counts 1, 2, 3, 4, 6, 7, 8, and 10 (§ 12022.53, subd. (b)); Nesby personally used a firearm in the commission of the offense charged in count 9 (§ 12022.5, subd. (a)); and a principal was armed with a firearm in the commission

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> Because the only issue on appeal is the sentencing, as to which the People concede, we do not discuss the evidence presented at trial.

<sup>3</sup> The trial court dismissed count 5 prior to trial.

of the offenses charged in counts 6, 7, and 8 (§ 12022, subd. (a)(1)).

The trial court sentenced Nesby to an aggregate state prison sentence of 36 years eight months. The trial court designated count 1 for second degree robbery as the principal term. The court imposed on this count the upper term of five years, plus 10 years for the personal use of a firearm under section 12022.53, subdivision (b). On counts 2, 3, 4, 6, and 10 for second degree robbery, the trial court imposed consecutive terms of one year (one-third the middle term of three years), plus additional terms of three years four months for the firearm-use enhancements under section 12022.53, subdivision (b) (one-third the 10-year enhancements).<sup>4</sup>

On count 7 for false imprisonment and count 8 for commercial burglary, the trial court imposed and stayed the middle terms of two years and the firearm-use enhancements,<sup>5</sup> pursuant to section 654. On count 9 for assault with a firearm the trial court imposed and stayed the middle term of three

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<sup>4</sup> The trial court stayed the sentence on the allegations in counts 1 through 4 and 6 through 10 that a principal was armed in the commission of the offenses under section 12022, subdivision (a)(1).

<sup>5</sup> The trial court did not orally address the term it was staying for the firearm-use enhancements on counts 7 and 8. However, the minute order and abstract of judgment reflect the trial court stayed the 10-year firearm-use enhancements under section 12022.53, subdivision (b). We note the enhancement under section 12022.53, subdivision (b), is only applicable to specified crimes, not including false imprisonment and commercial burglary. (See § 12022.53, subds. (a), (b).) On remand, the trial court should strike these enhancements.

years, plus the middle term of four years for the firearm-use enhancement (§ 12022.5, subd. (a)), pursuant to section 654.

B. *Remand for Resentencing Is Necessary Pursuant to Sections 12022.5, Subdivision (c), and 12022.53, Subdivision (h)*

Nesby contends, the People concede, and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the firearm-use enhancements to Nesby's sentence pursuant to sections 12022.5, subdivision (a), and 12022.53, subdivision (b).

In 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018. Senate Bill No. 620 amended sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to give trial courts discretion to strike firearm-use enhancements under these sections in the interest of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h), as amended by Stats. 2017, ch. 682.)<sup>6</sup> Both sections contain identical language: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

The People concede sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended, apply retroactively to Nesby, whose sentence was not final at the time those provisions came into effect. (See *People v. Hurlie* (2018) 25 Cal.App.5th 50, 56; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People*

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<sup>6</sup> Senate Bill No. 620 did not add a similar provision with respect to section 12022, subdivision (a).

*v. McDaniels* (2018) 22 Cal.App.5th 420, 424.) Further, the People concede remand is necessary to allow the trial court to exercise the discretion it did not have at the time of sentencing because the trial court did not indicate whether it would have stricken the firearm-use enhancements if it had the discretion. “[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels*, at p. 425; accord, *People v. Billingsley*, at p. 1081 [remand is required when “the record does not ‘clearly indicate’ the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion”].)

Remand for resentencing is appropriate to allow the trial court to consider whether to exercise its discretion to strike the firearm-use enhancements under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), in the interest of justice.

## **DISPOSITION**

The judgment of conviction is affirmed. The matter is remanded for the limited purpose of allowing the trial court to exercise its sentencing discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h).

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.